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No. 09-471

Supreme Court, U.S.
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In The Supreme Court of the United States

MARSHA FALCHENBERG,

Petitioner,

v.

NEW YORK STATE DEPARTMENT OF EDUCATION, THE STATE OF NEW YORK, and NATIONAL EVALUATION SYSTEMS, INC., a/k/a NYSTE PROGRAM,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Petitioner submits this Brief in reply to NES's Brief in Opposition (the "NES Brief"). The other Respondents have waived their right to submit opposition briefs.

In its Brief, NES contends that the Petition should not be granted because any type of external spelling aid (an oral examination, a dictionary, a transcriber or a spell checker) would interfere with NES's evaluation of Petitioner's ability to prepare an essay that is graded for, among other things, spelling. (NES Brief at 11.) NES also contends that Petitioner misstates or mischaracterizes the Record. (NES Brief at 5-8.) We briefly respond to these two contentions below.

I. REASONS FOR GRANTING THE WRIT

The central issue in this case is whether an external spelling aid, such as a spell checker, a dictionary or a transcriber, would fundamentally alter the LAST. To answer that question, necessarily requires an analysis of the nature and purpose of the specific spelling skill being tested by the LAST. Indeed, this Court's decision in *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001) requires that such a fundamental alteration analysis be conducted.

Neither lower court decision, however, conducted a fundamental alteration analysis of the spelling skill being tested or the underlying purpose of the skill

being tested. The District Court simply held that since spelling is measured, it is fundamental as a matter of law and a spelling aid need not be provided on the ground that such an accommodation would waive measurement of that "fundamental" skill. (Petition Appendix ("Pet. App.") at 24-25.) The Second Circuit affirmed on the same grounds. (Pet. App. at 4.)

These lower court decisions directly conflict with *PGA Tours* because that decision requires a fundamental alteration analysis, which in the context of this case must consider the following factors:

- the exact spelling skill that the essay part of the LAST purports to measure and that skills' scoring value on the test
- whether the LAST measures a person's ability to orally spell, as in the skill measured by a spelling bee
- whether the LAST measures one's ability to prepare a final written product or whether the test also measures the means whereby that written product is prepared, such that an external spelling aid would be inappropriate
- the underlying purpose of the spelling skill actually being tested
- whether the spelling skill that NES claims to be testing is fundamental to the LAST, in light of the fact that a spell checker was an authorized accommodation for the LAST when the test

was first created and for the first two years of its administration

- whether the spelling skill that NES claims to be testing is fundamental, in light of the fact that a spell checker is a standard accommodation for teacher certification tests throughout the rest of the country

Rather than conducting the required analysis, both lower courts *sub silentio* embraced the view of the law expressed by the dissent in *PGA Tours*. The dissent opined that the lower courts need not engage in a fundamental alteration analysis on a case-by-case basis and that the providers of public accommodations ought to be able to establish their own set of rules and procedures, free of any constraints that may arise under the ADA from accommodation requests by persons with disabilities.

In its opposition, NES pays lip service to *PGA Tours* but that is all. Nowhere in its Brief, does NES explain the nature or value of the spelling skill it purports to measure or how a spelling aid would fundamentally interfere with an evaluation of the test-taker's ability to prepare a final written product. Instead, NES argues by tautology: "Petitioner's competency at spelling cannot be tested with requiring her to actually spell"; "to permit outside assistance with spelling on the examination (either through a mechanical spelling aid or a human spelling assistant) would obviously interfere with the scoring of the LAST"; and "[a] modification in the

scoring of an exam is, by its very nature, a modification which 'fundamentally alters the measurement of the skills or knowledge the examination is intended to test.'" (NES Brief at 6, 8 & 10, respectively.)

The Petition should be granted because standardized tests for employment, certification, and educational purposes are used extensively throughout the Nation and this case presents an opportunity for this Court to re-affirm that *PGA Tour*'s fundamental alteration analysis is the law and that it applies to this important aspect of our society.

II. THE PETITION DOES NOT MISSTATE THE RECORD

NES claims that the Petitioner "egregiously misstates" the Record in four particular subject matters or facts. (NES Brief at 5-8.) We briefly respond as follows:

1. The Accommodations Granted Petitioner. NES argues that Petitioner has distorted the record about the accommodations given to Petitioner, suggesting that Petitioner was given all the accommodations that she requested. It states that "Petitioner was granted every reasonable accommodation she requested." (NES Brief at 5.)

Quite obviously, the key to this argument is the word "reasonable." To give an *un*reasonable accommodation or to require that a reasonable accommodation be performed under *unreasonable* conditions can

certainly be tantamount to no accommodation at all, depending on the circumstances.

Here, Petitioner requested over an 18 month period a series of accommodations, including an oral examination, a dictionary and a transcriber. (Pet. App. at 16-19.) After she was terminated from her position as a public school teacher, NES ultimately agreed to provide Petitioner with a transcriber but also required that as she dictated her essay she also had to dictate spelling, capitalization, paragraphing and punctuation. (Pet. App. at 18-19.) As we noted in the Petition (Petition at p. 5, fn.*), that is an impossible task, particularly for a dyslexic, and accordingly the transcriber "accommodation" offered by NES was illusory. The record fully supports these facts.[1]

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[1] Petitioner testified that after being offered the transcriber, NES told her that she would have to dictate her essay and at the same time, dictate spelling and grammar: "She [Elise Stromgren of NES] told me that I would have to spell every single word that I needed to – that I used out of my mouth up in the air. . . . I would have to spell it out . . . punctuate everything up in the air. . . . And then I said, well, I don't I – I can't do that. And then she said, well, maybe you shouldn't be teaching." (Falchenberg Deposition Transcript at pp. 371:23-372:24, reprinted in the Joint Appendix submitted to the Second Circuit (hereinafter cited "JA") at 760-61.)

NES's expert during the litigation before the District Court, who also reviewed Petitioner's accommodation requests at the time of her requests, testified as follows:

> Q. All right. Am I correct that to require somebody with dyslexia to dictate an essay, and at the

(Continued on following page)

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same time, to dictate spelling, capitalization, and punctuation would be a very difficult task?

Ms. Rodriguez: Objection.

A. It could be a difficult task.

Q. Could it be the kind of task that somebody with dyslexia would be unable to perform because it taxes too many cognitive functions?

A. It could be.

Q. Why it that?

Ms. Rodriguez: Objection.

A. Simply because of the complexity of doing all those things at the same time.

(JA 893-94.)

Petitioner's expert, Dr. Amy Margolis, submitted an expert's report, which stated in relevant part:

> I understand that NES has required Ms. Falchenberg to indicate orally spelling, paragraphing, punctuation, and capitalization for every word that a scribe would write for the essay portion of the LAST. This is not an appropriate accommodation for her disability because it is not an appropriate means for measuring her knowledge. More important, this proposed method of requiring a dyslexic person to perform oral spelling, punctuation, capitalization and paragraphing would deactivate short-term memory and cause tremendous cognitive interference, thereby inhibiting a person's ability to demonstrate their knowledge.

(JA 961-62.)

Since NES claims that Petitioner has made several "egregious" misstatements or mischaracterizations of the record, we have set forth in footnotes to this section of the Reply Brief direct quotes from the record with citations to the Joint Appendix submitted to the Second Circuit. We understand that the Joint Appendix can also be made available to the Court and urge the Court to request it, in the event that there are any concerns about Petitioner's characterizations of the record.

2. The Request for a Spell Checker. NES claims that Petitioner misrepresents the nature of her accommodation requests because Petitioner never specifically requested a spell checker. (NES Brief at 6.) It is correct that Petitioner never specifically requested the use of a spell checker. Instead, she requested an oral examination, a reader and a transcriber, and a dictionary. (*See* Pet. App. at 16-18.)

However, a transcriber or a dictionary is, in the context of this case, a kind of external spelling aid, and a spell checker is simply another kind of spelling aid that is functionally equivalent to a transcriber or a dictionary. Indeed, NES argues that the use of *any* of these spelling aids for the LAST would constitute a fundamental alteration of the LAST. (NES Brief at 11.) Moreover, NES had a duty to engage in a dialogue with Petitioner about her requests and to make appropriate suggestions to Petitioner of possible accommodations as part of the good-faith interactive process required by the ADA.[2] Thus, that Petitioner did not make a specific request for a spell checker as opposed to a transcriber or a dictionary does not change the substantive analysis of whether the use of

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[2] *See US Airways, Inc. v. Barnett*, 535 U.S. 391, 407 (2002) (Stevens, J., concurring); *see also* 28 C.F.R. § 36.309(b)(3), *reprinted in* Pet. App. at 39 (private testing company must provide appropriate auxiliary aids unless it can show that the aid would fundamentally alter the test); *see generally* 29 C.F.R. § 1630.2(o)(3) and EEOC Appendix Section 1630.9 (in the employment context, both parties must engage in a problem-solving dialogue).

an external spelling aid would constitute a fundamental alteration of the LAST.

3. The Prior Permitted Use of a Spell Checker. NES claims that "there is no evidence in the record establishing that a spellchecker, or any other spelling aid, has ever been permitted on the LAST." (NES Brief at 6-7.) NES is simply wrong.

During discovery NES produced a document entitled "New York Teacher Certification Examination – Process for Handling Accommodations for Examinees with Special Needs." That document specifically states:

> Accommodations that require substantial alteration in standard testing conditions, procedures, and/or materials may include:
>
> • mechanical aids provided by the examinee (e.g., Franklin Speller, talking calculator). . . .[3]

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[3] JA at 976. This document was produced by NES pursuant to an order by the District Court, directing NES to produce the accommodation guidelines for the LAST in effect from 1991 through 1996. *Id.* at 975-76. In its letter transmitting the guidelines, NES's counsel confirmed compliance with the order by stating: "Enclosed is a copy (Bates Nos. NES 1233-39) of the January 1994 version of the guidelines governing test accommodations for the LAST. Please note that no earlier versions of the guidelines have been located to date, since the NYSTCE tests were not officially administered prior to the Fall of 1993." (JA at 972.) Thus, the record shows that the Franklin spell checker was specifically authorized for the LAST for the two year period from January 1994 through the end of 1995.

Thus, the record supports the facts regarding the prior permitted use of a spell checker for the LAST, a fact that undercuts – fatally – NES's claim that an external spelling aid would fundamentally alter the LAST.

4. The Other States' Permitted Use of Spell Checkers. NES claims that "there is no competent evidence in the record that *every* other state in the country permits the use of a spellchecker on all teacher-certification examinations." (NES Brief at 7; emphasis in original.) Again, NES is wrong – the record shows that in all States, except for New York, a spell checker is a permitted accommodation for teacher certification tests.[4] As noted in the Petition,

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[4] During discovery, Petitioner took the deposition of Educational Testing Services ("ETS"). That nation-wide testing company provides teacher certification tests known as the Praxis Series for 37 States (JA 1013), and during that deposition, ETS's witness testified that "The ETS spell checker has been approved for the constructed response and/or essay portions of the following tests: the GRE-Graduate Record Examinations, GRS-GRE Subject Test, GMAT-Graduate Management Admissions Test, the Praxis Series Examinations, and the Test of English as a Foreign Language (TOEFL)." (JA at 998).

At its deposition, NES's witness testified that NES permits the use of a spell checker for its teacher certification tests outside of New York State (JA 866), and in response to a discovery order by the District Court, NES stated that in 12 other States a spell checker is a permitted accommodation for the teacher certification tests in those States administered by NES. (JA 971). Thus, 49 States permit the use of a spell checker for their teacher certification tests and New York is the only State that prohibits its use on teacher certification tests.

New York State's isolated and extreme position on the use of an external spelling aid for persons with disabilities highlights an additional reason for granting the Petition – the need for the courts to enforce the ADA's sweeping mandate to make uniform the laws governing disability discrimination.

CONCLUSION

The Petition should be granted and the case set for plenary review.

Respectfully submitted,

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